SUPREME COURT
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IN THE

Supreme Court of the United States

DANIEL WRIGHT, *et al.*,
Petitioners,

v.

POTOMAC ELECTRIC POWER COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

May a federal district court rely on its local rule 7(h) and ignore plaintiffs' pleadings, depositions, answers to interrogatories and affidavits when ruling on a summary judgment motion even when the case law of the circuit require that all of these items be considered pursuant to Federal Rule of Civil Procedure 56(c)?

PARTIES TO THE PROCEEDING IN THIS COURT

Daniel Wright

George A. Blakeney

Quinton Briscoe

Calvino Stanford

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PETITION FOR A WRIT OF CERTIORARI

JURISDICTION

The judgment of the court of appeals was entered on May 24, 2005, and rehearing was denied on July 26, 2005. This Court has jurisdiction under 28 U.S.C. § 1254(1)

RULE INVOLVED

The pertinent part of Federal Rule of Civil Procedure 56 is reproduced at page 27a of the Appendix.

STATEMENT OF THE CASE

This case involves four African-American men. Three of them, George Blakeney, Calvino Stanford and Quinton Briscoe are presently employed by Potomac Electric Power Company and one, Daniel Wright was discharged by the company in 2002 and has found employment elsewhere.

In 2003 these petitioners filed a complaint alleging discrimination in employment against Potomac Electric Power Company (pepco) and discrimination by their bargaining unit, Local #1900 of International Brotherhood of Electrical Workers (IBEW) for failing to file a grievance against the discrimination.

At the close of discovery, pepco and IBEW filed Motions for summary judgment. Petitioners filed their opposition which included answers to interrogatories, the second amended complaint and affidavits. These documents were cited in their statement of facts disputing the allegations contained in defendants' alleged material facts to which there were no genuine issues for trial. The district court granted summary judgment in favor of both pepco and IBEW and against petitioners.

In its Memorandum Opinion the district court deemed the facts contained in defendants' statements of material facts as admitted. (App.3, n2) and disregarded or ignored plaintiffs' disputed facts which were supported by materials in the record. The district court also made two findings which are misstatements of the record. First the court characterizes Jim Roddy, the white man who kicked George Blakeney as an independent contractor. (App.5). This is based, according to the court, on plaintiffs' second amended complaint. Nowhere do plaintiffs refer to Jim Roddy as an independent contractor in their pleadings. This statement is significant because as an independent contractor, pepco would not be liable for the actions of an independent contractor. However, Jim Roddy was a contract worker, not an independent contractor and pepco would be liable for his actions.

The district court also states that George Blakeney conceded the untruth of his allegation about favorable rotation of two white employees. (App. 15). Nowhere does George Blakeney make such a concession. This misstatement goes to

the heart of George Blakeney's complaint which is that the breach of contract resulted in him being discriminated against.

By disregarding the standards for summary judgment contained in Federal Rule of Civil Procedure 56 and making findings based on misstatements of the record, the district court granted summary judgment against petitioners. The court of Appeals upheld the district court's Memorandum Opinion. (App. 24). Thereafter, a petition for rehearing, was denied without opinion. (App. 26).

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW IS INCONSISTENT WITH THE PRINCIPLES IN *PATTERSON*, WHICH MADE PRECEDENCE BINDING UNTIL IT HAS BEEN OVERRULED, AND RELIANCE BY THE COURT ON MATERIAL FACTS NOT SUPPORTED BY THE RECORD JEOPARDIZES THE INTEGRITY OF THE JUDICIAL PROCESS

The petition should be granted because the decision below cannot be reconciled with either the principle or result in *Vasquez v. Hillery*, 474 U.S. 254 (1986) which stated the importance of stare decisis or *Patterson v. McLean Credit Union*, 491 U.S. 164, (1989) which requires lower courts to follow precedence until it has been overruled.

The District of Columbia Circuit has held in *Burke v. Gould*, 286 F.3d 513 (D.C. Cir 2002) that Local Rules "supplement" and shall be construed in harmony with the Federal Rules of Civil Procedure quoting *Frazier v Heebe*, 482 U.S. 641. Indeed, the court in *Burke* stated "the district court is required by Federal Rule of Civil Procedure 56(c) itself to consider the 'pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any in determining whether there is no genuine issue as to a material fact . . ." However, in the present case

the district court relied on Local Rule 7(h) and ignored the factual disputes contained in petitioners' statement of facts. Plaintiffs' statement of facts which referred to parts of the record in their Second Amended Complaint, Answers to Interrogatories and Affidavits created a genuine dispute and would have prevented summary judgment had they been considered.

More specifically, the District of Columbia Circuit has held in *In Re Korean Air Lines Disaster of September 1, 1983*, 829 F.2d 1171 (D.C. Cir. 1987) that "[b]inding precedent for all is set only by the Supreme Court, and for the district courts within a circuit, only by the court of appeals for that circuit". The district court in the present case did not have the authority to disobey the precedent set in *Burke* regarding the standards to use in ruling on a summary judgment motion.

Review is also warranted because the district court assumed the statement of material facts provided by the movants to be true when the movants' statements of material facts misstated the record that was before the court.

The district court's Memorandum Opinion at page 3 n.2 reads

> Plaintiffs' sparse opposition to defendants' motion for summary judgment fail to include "separate concise statement[s] of genuine issues setting forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated." LcvR 7(h). Where that is the case, "the court may assume that facts identified by the moving party in its statement of material facts are admitted, unless such a fact is controverted in the statement of genuine issues filed in opposition to the motion." *Id. See Also Carter v. Greenspan*, 304 F. Supp. 2d 12, 21 (D.D.C. 2004); *Farmer v. Hawk-Sawyer*, 69 F.Supp. 2d 1220, 121 n.2 (D.D.C. 1999). Given the scattershot and discursive nature of plaintiffs' factual allegations, the Court has little choice but to rely pri-

marily upon defendants' statement of facts and memorandum in sketching the necessary factual background.

The district court not only relied primarily on defendants' statements of facts. It relied almost exclusively on defendants' statements of facts even when those statements misstated the record that was before the court.

Where the materials contained in the movant's statements of material facts do not support the factual assertions, the court is free to disregard the assertion. *Holtz v. Rockerfeller & Co., Inc.*, 258 F.3d 62 (2nd Cir. 2001). Court will not deem movant's facts admitted when they misstate the record. *Fund For Animals v. Williams*, 246 F. Supp. 2d 27, n.7

At page 5 of the district court's Memorandum Opinion it characterized Jim Roddy, the white man who kicked petitioner, George Blakeney, in the butt as an independent contractor. This was in reliance on defendant pepco's Motion for summary judgment at page 30. Pepco refers to Plaintiffs Second Amended Complaint at ¶¶ 27-28. Neither at paragraphs 27 and 28 or any other place in plaintiffs' complaint do they refer to Jim Roddy as an independent contractor. In subsequent pleadings before the court of appeals, plaintiffs' have disputed pepco's and the district court's characterization of Jim Roddy as an independent contractor and this misstatement has not been challenged by defendants.

At page 15 of the district court's Memorandum opinion it states that George Blakeney conceded the untruth of his allegations about favorable rotation of two white employees during his deposition. This inaccurate statement was disputed by Blakeney. But since the district court chose to ignore petitioner Blakeney's affidavits, Answers to Interrogatories and Complaint based on its decision that Local Rule 7(h) prohibited him from reading these documents, summary judgment was granted against George Blakeney.

The district court cites two cases for its proposition that Local Rule 7(h) controls the standards in granting summary judgment motions. *Carter v. Greenspan*, 304 F. Supp. 2d 13 (D.D.C. 2004) and *Farmer v. Hawk-Sawyer*, 69 F. Supp. 2d 120 (D.D.C. 1999). Both of these are decisions of district courts which are not binding on the other district courts. *See Carter v. Greenspan*, 304 F. Supp. 2d 13, 24 n.10 (D.D.C. 2004) However *Burke v. Gould*, is a circuit court decision which is binding on all inferior courts in that circuit. This difference between what the district court used in reviewing motions for summary judgment and the requirements contained in *Burke* creates uncertainty within the District of Columbia Circuit. This uncertainty makes this case worthy of review and would provide certainty and uniformity within the circuit.

CONCLUSION

For these reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 03-0946 (JDB)

JESSIE BUTLER, *et al.*,
Plaintiffs,

v.

POTOMAC ELECTRIC POWER COMPANY, *et al.*,
Defendants.

MEMORANDUM OPINION

Plaintiffs in this case are present and former African American employees of the Potomac Electric Power Company ("Pepco") who claim, purportedly on behalf of many others, that Pepco discriminated against them on the basis of race in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII"), the District of Columbia Human Rights Act, D.C. Code Ann. § 2-1401 *et seq.* ("DCHRA"), and 42 U.S.C § 1981 ("Section 1981"). Plaintiffs also contend that Pepco's allegedly discriminatory actions violated their collective bargaining agreement, and that their collective bargaining representative, Local Union No. 1900 of the International Brotherhood of Electrical Workers (the "Union"), and John A. Coleman, the Union's president ("Coleman") (collectively, "the Union defendants"), breached their duty of fair representation under the Labor Management Relations Act, 29 U.S.C. § 185 ("LMRA"), by failing adequately to pursue Pepco's alleged wrongdoings.

Five motions are presently before the Court: plaintiffs' motion for class certification, motions for summary judgment by Pepco and the Union defendants, Pepco's motion to

compel certain discovery responses from plaintiffs, and the Union defendants' motion for sanctions pursuant to FED. R. CIV. P. 11. For the reasons discussed herein, the Court will deny plaintiffs' motion for class certification, grant defendants' motions for summary judgment, deny Pepco's discovery motion as moot, and d ny the Union defendants' motion for sanctions.

BACKGROUND

The first complaint in this action named only Jessie Butler and Donnell A. Brown as plaintiffs. Butler and Brown alleged that Pepco and Steven Lawson, their supervisor, discriminated against them on the basis of race by failing to promote them to available positions for which they were qualified, and by creating a hostile work environment. Compl. ¶¶ 4-7. Subsequently, the complaint was amended to add claims for intentional infliction of emotional distress and punitive damages. Am. Compl. ¶¶ 45-71. The complaint was amended again, and this Second Amended Complaint omits all substantive allegations as to Butler and Brown. Instead, despite retaining Butler and Brown in the caption of the document, it names as plaintiffs present and former Pepco employees Daniel Wright, George Blakeney, Quinton Briscoe, Albert Scott, Phillip Wood, and Calvino Stanford. 2d Am. Compl. ¶¶ 3-8. Additionally, the Second Amended Complaint lists the names and addresses of fifty-one African American Pepco employees who have allegedly "asked to be represented in this action." *Id.* ¶ 12. The Union defendants are named in the Second Amended Complaint for the first time. *Id.* 9.[1]

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[1] Pepco proceeds in its motion for summary judgment as if Butler and Brown remain parties to this case. *See* Pepco Mot. at 10-18. in their opposition to Pepco's motion for summary judgment, plaintiffs largely do not respond to Pepco's arguments about Butler and Brown. The Union defendants, who were served only with the Second Amended Complaint, "assert that the only claims pending against them are the six named Plaintiffs' claims that are set forth in the Second Amended Complaint." Union

Pepco is a public utility company providing electric services in the Washington, D.C. metropolitan area. All the plaintiffs are members of the Union, and their employment is governed by a collective bargaining agreement negotiated between the Union and Pepco. Pepco Mot. S. J. at 1.[2] Pepco

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Mot. S. J. at 2. Plaintiffs apparently disagree. Two documents have been filed in response to the Union's motion for summary judgment: an opposition ("Pls. Opp'n to Union Mot. S. J.") and a memorandum of points and authorities ("Pls. Mem. to Union Mot. S. J."). In the latter of these, plaintiffs contend that the Second Amended Complaint named six *additional* plaintiffs and argue, curiously, that "[t]he claims asserted in the Original Complaint and the First Amended Complaint are included in the Second Amended Complaint because of the relation back provision of FED. R. CIV. P. 15(c)." Pls. Mem. to Union Mot. S. J. at 11. The Second Amended Complaint does not on its face incorporate any of the allegations of its predecessors. "An amended complaint ordinarily supersedes the original, and renders it of no legal effect." *Dorchy v. WMATA*, 45 F. Supp. 2d 5, 7 (D.D.C. 1999) (quoting *Austin v. Ford Models, Inc.*, 19 F.3d 148, 155 (2d Cir. 1998)). Plaintiffs' invocation of Rule 15(c) is misguided. That rule outlines the circumstances under which "[a]n amendment of a pleading relates back to the date of the original pleading." FED. R. CIV. P. 15(c). The Rule does not speak to what is at issue here: whether the Second Amended Complaint in fact states claims on behalf of Butler and Brown against the Union defendants. Plaintiffs seem to answer this question in the negative by failing to make substantive arguments on behalf of Butler and Brown in the balance of their filings. Nonetheless, the Court will discuss the allegations of Butler and Brown out of an abundance of caution.

[2] Plaintiffs' sparse oppositions to defendants' motions for summary judgment fail to include "separate-concise statement[s] of genuine issues setting forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated." LCvR 7(h). Where that is the case, "the court may assume that facts identified by the moving party in its statement of material facts are admitted, unless such a fact is controverted in the statement of genuine issues filed in opposition to the motion." *Id. See also Carter v. Greenspan*, 304 F. Supp. 2d 13, 21 (D.D.C. 2004); *Farmer v. Hawk-Sawyer*, 69 F. Supp. 2d 120, 121 n.2 (D.D.C. 1999). Given the scattershot and discursive nature of plaintiffs' factual allegations, the Court has little choice but to rely primarily upon defendants' statements of facts and memoranda in sketching the necessary factual background.

employees are organized into occupational groups or "lines of progression," and each position within such lines of progression is assigned a pay grade level. Butler and Brown work in the Design Technician line of progression in the Design Services Department, which is located at Pepco's main headquarters building in Northwest Washington. Wright, Blakeney, Briscoe, Scott, and Wood work or worked in the Cable Splicer line of progression at the Pepco facility on Benning Road in Southeast Washington. Stanford works in the Distribution Design Department, also at the Benning Road location. The Court discusses their allegations in turn.

Pepco hired Butler in 1978 and transferred him into the Design Services Department in 1994. He was promoted into his present position in December 2003. *Id.* at 8-9. Brown was hired into Design Services in 1987 and has since received two promotions. *Id.* Until he retired in 2003, Lawson was manager of the Design Services Department and, as such, their supervisor.[3] Butler alleges that Lawson treated him less favorably than he did non-African American employees in various ways: he monitored the length of his lunch breaks more closely, allowed him fewer work experiences needed to compete for job promotions, failed to notify him of job vacancies, required him to do work above his pay grade, and gave him fewer opportunities to work overtime. Am. Compl. ¶¶ 14-20. Similarly, Brown claims that Lawson denied him meaningful work assignments and withheld from him information about job vacancies at higher pay grades. He alleges that Lawson once refused to promote him when, in 1995, his immediate supervisor had recommended that he be promoted. *Id.* ¶¶ 25-29. Finally, both Butler and Brown assert, with little elaboration, that Lawson created a hostile work environment for them. *Id.* ¶¶ 21, 35. Butler filed an

[3] Pepco notes that Lawson, his supervisor Paulette Paine, and Thomas Jones, who is Butler's and Brown's current supervisor, are all African American. Pepco Mot. S. J. at 8.

EEOC complaint in May 2002 alleging that he had been wrongfully denied promotions in 1999 and 2000; Brown filed a similar complaint in June 2002.

Wright has been promoted four times since he was hired by Pepco in 1986. Pepco Stmt. Material Facts ¶ 41. According to the Union, he has never been passed over for any promotion in favor of an employee with lesser seniority, and has never requested that the Union file a grievance on his behalf. Union Stmt. Material Facts ¶¶ 8-9. However, on March 18, 2002, Wright complained to Pepco's Equal Employment Opportunity office that his African American supervisor had insulted him with a racial epithet. Pepco investigated the complaint and ultimately disciplined the supervisor. Pepco Stmt. Material Facts ¶ 44. Wright claims that he was so humiliated and emotionally distressed as a result of his supervisor's harassment that he resigned from Pepco on August 2, 2002. Pls. Opp'n to Pepco Mot. S. J. at 1. On December 2, 2002, he filed a charge of discrimination with the EEOC. Pepco Stmt Material Facts ¶ 47.

Blakeney was hired by Pepco in 1975 and has since been promoted four times. He is now a Lead Cable Splicer, the highest position in the Cable Splicer line of progression. *Id.* ¶ 51. Approximately between May 2001 and February 2002, Blakeney was required to rotate through the Oil Department. His title, pay grade, and benefits remained the same during the rotation. *Id.* ¶ 53. However, Blakeney claims that his assignment violated the terms of the collective bargaining agreement and was discriminatory. 2d Am. Compl. ¶ 21. He theorizes that the applicable rotation program was put into effect in such a way as to spare two white employees transfers into what was perceived as a less-desirable-department. Blakeney insists that he asked his Union steward to file a grievance form with the Union on his behalf regarding the rotation, *id.* ¶ 22, but no such grievance was ever filed, *see* Union Stmt. Material Facts ¶ 12. In retaliation for his at-

tempts to complain about the rotation, Blakeney claims that his supervisor and an independent contractor conspired to teach him a lesson. 2d Am. Compl. ¶ 27. Thus, the independent contractor allegedly kicked him, causing him back injuries that required him to leave work for three weeks and undergo unspecified medical treatment. *Id.* ¶ 28. Neither the supervisor nor the Union allegedly took any action against the independent contractor.

Briscoe, who was hired by Pepco in 1976, is now a Class A Cable Splicer. His job duties include inspecting manholes and overseeing Pepco contractors doing new construction work. Pepco Mot. S. J. at 33. Since 1984, the Union has processed fourteen grievances on his behalf—three are still open inquiries. Union Stmt. Material Facts ¶ 15. In this action, Briscoe alleges that he was discriminatorily passed over for promotion from Class A Splicer to Lead Splicer in 2002 and 2003. In 2002, one African American and one white employee were promoted ahead of him; in 2003, one African American employee was promoted ahead of him. Pepco Mot. S. J. at 34. At either juncture, Briscoe was ineligible for promotion because he had disciplinary measures in effect against him. Pepco Stmt. Material Facts ¶¶ 69-70. These measures were taken after Briscoe was involved in a work-related accident. Briscoe asserts that white employees involved in similar mishaps received more lenient treatment. Pls. Opp'n to Pepco Mot. S. J. at 3, 8. Briscoe also alleges in conclusory fashion that he has not been given desirable assignments on account of his race, and that his (African American) supervisor on one occasion denied him overtime and another time warned him that further disciplinary infractions could lead to his termination. Pepco Mot. S. J. at 36-37.

Scott is presently a Class C Cable Splicer, and has been promoted three times since he joined Pepco in 1993. Pepco Stmt. Material Facts ¶ 76. He claims that, in 1998, he was

denied a promotion extended to several of his white colleagues. Dep. of Albert J. Scott, Dec. 12, 2003, at 26. Furthermore, he claims that he is "currently being denied promotion." 2d Am. Compl. ¶ 5. As of the date of the Second Amended Complaint, he had not yet served the requisite time at his present pay grade to be eligible for promotion to Class B. Pepco Stmt. Material Facts ¶¶ 78-79. Scott also asserts that he has been discriminatorily denied exposure to certain tasks he must complete to qualify for advancement. 2d Am. Compl. ¶ 47. He points to two white co-workers who have had preferable assignment rotations, and claims that his rotations in the Oil and Service Departments have delayed his relative progress. *Id.* ¶ 45. Finally, Scott claims that he was verbally harassed by a white co-worker on four occasions between January and June 2003, but does not allege that this mistreatment was racially motivated. *Id.* ¶ 46; Pepco Mot. S. J. at 42.

Wood, also a Class C Cable Splicer, has been promoted three times since he joined Pepco in 1994 or 1995. Pepco Stmt. Material Facts ¶ 84. He alleges that he has been denied a promotion, that he has not been given assignments necessary for advancement, and that he was transferred from a splicing truck to a service truck, all on the basis of race. 2d Am. Compl. ¶¶ 48-50. He claims that two white men were allowed to remain on the splicing truck, which is more desirable for career advancement purposes, but does not allege that they were retained in his stead. Wood does not allege that he is presently eligible for promotion, and Pepco claims he is not. Pepco Stmt. Material Facts ¶¶ 88-89. He has not filed a grievance with the Union pursuant to the Collective Bargaining Agreement. *Id.* ¶ 97. Wood also claims to have been made uncomfortable by racially-infused talk from his co-workers. *See* Dep. of Phillip Wood, Dec. 15, 2003, at 119-121.

Stanford, who is presently a Class C Distribution Designer, alleges that, when he was hired, he was misled into taking a

lower paying position than one for which he was allegedly qualified. He claims that Pepco denied his subsequent request for a transfer into the higher paying job and instead hired a less qualified white woman. 2d Am. Compl. ¶ 52. Pepco responds that Stanford was unqualified for the position he sought because he lacked field experience, Pepco Stmt. Material Facts ¶¶ 98, 103, and that he could not be transferred because he failed to meet a weight-lifting requirement, Pepco Mot. S. J. at 52. While Stanford asserts that the Union has not fairly represented him, 2d Am. Compl. ¶ 52, the Union claims that Stanford has not asked it to file a grievance on his behalf, Union Stmt. Material Facts ¶ 21. According to Pepco, Stanford has never filed a charge with the EEOC regarding his allegation that he was discriminatorily placed in a lower paying position, Pepco Stmt. Material Facts ¶ 105.

ANALYSIS

A. Applicable Legal Standards

1. Class Certification

"One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class." FED. R. CIV. P. 23(a). The party seeking certification has the burden of demonstrating that all of the requirements of Rule 23(a) have been met, and the Court has broad discretion when determining whether a particular class should be certified. *Chang v. United States*, 217 F.R.D. 262, 268 (D.D.C. 2003) (citing *McCarthy v. Kleindienst*, 741 F.2d 1406, 1410 (D.C. Cir. 1984)). Additionally, plaintiffs seeking to maintain a class action must make an affirmative showing that (1) the prosecution of

separate actions would create a risk of inconsistent adjudications, (2) defendants have acted or refused to act on grounds applicable to the class, or (3) common questions of law or fact predominate over any questions affecting only individual members. FED. R. CIV. P. 23(b). The Court must engage in a "rigorous analysis" of whether the proposed class meets the requirement of Rule 23, and retains an ongoing obligation to do so throughout the litigation. *See General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 155 (1982).

2. Summary Judgment

Summary judgment is appropriate when the pleadings and the evidence demonstrate that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). The party seeking summary judgment bears the initial responsibility of demonstrating the absence of a genuine dispute of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The moving party may successfully support its motion by "informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Id.* (quoting FED. R. CIV. P. 56(c)).

In determining whether there exists a genuine issue of material fact sufficient to preclude summary judgment, the court must regard the non-movant's statements as true and accept all evidence and make all inferences in the non-movant's favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). A non-moving party, however, must establish more than the "mere existence of a scintilla of evidence" in support of its position. *Id.* at 252. By pointing to the absence of evidence proffered by the non-moving party, a moving party may succeed on summary judgment. *Celotex*, 477 U.S. at 322. "If the evidence is merely colorable, or is not

significantly probative, summary judgment may be granted." *Anderson*, 477 U.S. at 249-50 (internal citations omitted). Summary judgment is appropriate if the non-movant fails to offer "evidence on which the jury could reasonably find for the [non-movant]." *Id.* at 252.

3. Rule 11

Rule 11 sanctions "protect the court from frivolous and baseless filings that are not well grounded, legally untenable, or brought with the purpose of vexatiously multiplying the proceedings." *Cobell v. Norton*, 157 F. Supp. 2d 82, 86 n.8 (D.D.C. 2001). Sanctions "may be imposed if a reasonable inquiry discloses the pleading, motion, or paper is (1) not well grounded in fact, (2) not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, or (3) interposed for any improper purpose such as harassment or delay." *Westmoreland v. CBS, Inc.*, 770 F.2d 1168, 1174 (D.C. Cir. 1985).

B. Motion for Class Certification

Even cursory analysis reveals that plaintiffs' two-paragraph motion for class certification is insufficient. The Court cannot ascertain whether the requirements of Rule 23(a) have been met from a bare list[4] of alleged victims of discrimination at Pepco and the generalized allegations of the Second Amended Complaint. Yet plaintiffs supply little else in support of their motion for class certification—not affidavits, deposition testimony, statistical evidence, or company documents—to demonstrate the requisite commonality of questions of law or fact or typicality of claims or defenses among

[4] In their reply to Pepco's opposition to the motion for class certification, plaintiffs supply handwritten notes next to the names of some of the purported class members which apparently characterize their claims. These notes, detached from affidavits or evidence of any other sort, are unilluminating.

the purported class members. *See Hartman v. Duffy*, 19 F.3d 1459, 1472-73 (D. C. Cir. 1994) ("What the Court demands from those seeking certification of a class [like this one] is a 'specific presentation' identifying the questions of law or fact common to the class representative and the members of the class proposed.") (quoting *Wagner v. Taylor*, 836 F.2d 578, 589 (D.C. Cir. 1987)). Indeed, it would seem that plaintiffs' claims are too dissimilar to support an inference of commonality. Plaintiffs hail from three different departments, hold different positions, and voice a range of complaints against their various supervisors. Some plaintiffs allege wrongdoing by the Union and some do not. Additionally, as Pepco notes, there is some evidence that the named plaintiffs in this case may not fairly and adequately protect the interests of the purported class. In their deposition testimony, neither Butler nor Brown was able to describe the proposed class they allegedly represent. *See* Dep. of Jessie Butler, Nov. 25, 2003, at 119-20 ("Butler Dep."); Dep. of Donnell Brown, Dec. 1, 2003, at 145-47. Briscoe claimed not to know what it meant to be a proposed class representative. Dep. of Quinton Briscoe, Dec. 4, 2003, at 92, Attach. H. In short, plaintiffs have failed to make the showing required by Rule 23, and thus this case may not proceed as a class action.

C. Discrimination Claims

The Court applies the familiar burden-shifting analysis of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), to each plaintiffs' claims of discrimination and retaliation based on race. Initially, a plaintiff has the burden of establishing a prima facie case of discrimination or retaliation by a preponderance of the evidence. *Id.* at 802; *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981). In order to make out a prima facie case of discriminatory failure to promote, for example, a plaintiff must show that he is a member of a protected class; that he applied and was qualified for the promotion at issue; that despite his qualification,

he was rejected; and that, after his rejection, the position remained open and the employer continued to seek applicants who were no more qualified than plaintiff. *McDonnell Douglas*, 411 U.S. at 802. The prima facie case requirement was recently articulated by this Circuit as follows: "a plaintiff [must] state a prima facie claim of discrimination by establishing that: '(1) she is a member of a protected class; (2) she suffered an adverse employment action; and (3) the unfavorable action gives rise to an inference of discrimination.'" *Stella v. Mineta*, 284 F.3d 135, 145 (D.C. Cir. 2002) (quoting *Brown v. Brody*, 199 F.3d 446, 452 (D.C. Cir. 1999)). To establish a prima facie case of retaliation, a plaintiff must show: "(1) that she engaged in statutorily protected activity, (2) that the employer took an adverse personnel action; and (3) that a causal connection existed between the two." *Mitchell v. Baldrige*, 759 F.2d 80, 86 (D.C. Cir. 1985) (quoting *McKenna v. Weinberger*, 729 F.2d 783, 790 (D.C. Cir. 1984)); *accord Brown v. Brody*, 199 F.3d at 452.[5]

If the plaintiff establishes a prima facie case, the burden then shifts to the employer to articulate a legitimate, nondiscriminatory reason for its actions. *McDonnell Douglas*, 411 U.S. at 802. The employer's burden, however, is merely one of production. *Burdine*, 450 U.S. at 254-55. The employer "need not persuade the court that it was actually motivated by the proffered reasons. It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff." *Id.* If the

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[5] Under *McDonnell Douglas*, a common element of a prima facie case for both disparate treatment discrimination and retaliation is thus the requirement that plaintiff suffered "some form of legally cognizable adverse action by the employer." *Brown*, 199 F.3d at 453 (citing *Doe v. DeKalb County School Dist.*, 145 F.3d 1441, 1448 n.10 (11th Cir. 1998)). This is so because under the provisions of Title VII "there must still be some kind of injury for [an] employee to state a claim," and thus "[an] employee must first be 'aggrieved' in order to bring an action." *Id.* at 455.

employer is successful, the burden shifts back to the plaintiff to show that the employer's stated reason was a pretext for discrimination or retaliation. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143 (2000). The plaintiff "may attempt to establish that he was the victim of intentional discrimination 'by showing that the employer's proffered explanation is unworthy of credence.' *Id.* (quoting *Burdine*, 450 U.S. at 256). But "[p]roof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination." *Reeves*, 530 U.S. at 147.

Thus, the trier of fact may also "consider the evidence establishing the plaintiffs prima facie case 'and inferences properly drawn therefrom . . . on the issue of whether the defendant's explanation is pretextual.'" *Id.* (quoting *Burdine*, 450 U.S. at 255 n.10). "Whether judgment as a matter of law is appropriate in any particular case will depend on a number of factors . . . includ[ing] the strength of the plaintiffs prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that properly may be considered on a motion for judgment as a matter of law." *Reeves*, 530 U.S. at 148-49. Although under *McDonnell Douglas* the "intermediate evidentiary burdens shift back and forth under this framework, the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff' *Id.* at 143 (quoting *Burdine*, 450 U.S. at 253).

In this case, summary judgment is appropriate because no plaintiff has made a prima facie case of discrimination or retaliation by a preponderance of the evidence. Again, the Court considers the individual plaintiffs in turn.

Butler and Brown have no answer to Pepco's argument that their promotion claims are time-barred. Neither assert that they filed EEOC charges within either 180 or 300 days of

being wrongfully denied a promotion, and thus their Title VII claims cannot proceed. *See* 42 U.S.C. § 2000e-5(e)(1); *Currier v. Radio Free Europe*, 159 F.3d 1363, 1366 (D.C. Cir. 1998). Their original complaint was not filed until April 2003, after the DCHRA's one-year statute of limitations, *see* D.C. CODE ANN. § 2-1403:16, and § 1981's three-year statute of limitations, *see Brown v. District of Columbia*, 251 F. Supp. 2d 152, 162 (D.D.C. 2003), had run.[6] Moreover, Butler admits that he cannot identify even one similarly situated white employee who has been promoted as he believes he should have been. Butler Dep. at 70-71. Brown admits that he has never been passed over for promotion in favor of someone with lesser seniority than him. *Id.* at 55-58. Where, as here, plaintiffs present "no evidence beyond [their] own word that the denial of the promotions resulted from discrimination by defendant, such as documentation that [they] were qualified for the promotions, that defendant continued to seek applicants after rejecting plaintiff[s] who were no more qualified than [them], or that the positions ultimately were given to people outside of [their] protected class," summary judgment is appropriate. *Powell v. WMATA*, 238 F. Supp. 2d 160, 165 (D.D.C. 2002); *see also Richardson v. Nat'l Rifle Assoc.*, 871 F. Supp. 499, 503 (D.D.C. 1994). A similar lack of evidence dooms the sundry discrimination and hostile work environment claims that could arguably be gleaned from plaintiffs' allegations.

Wright's claims are also ripe for summary judgment. It has long been recognized that an isolated use of a racial epithet, though repugnant, is not actionable under Title VII. *See Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 66 (1986) ("'mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee would not affect

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[6] Indeed, no § 1981 claim was even alleged until plaintiffs filed the Second Amended Complaint, to which Butler and Brown are arguably not parties.

the conditions of employment to sufficiently significant degree to violate Title VII') (quoting *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971)); *accord Daso v. Grafton Sch., Inc.*, 181 F. Supp. 2d 485, 493 (D. Md. 2002). Moreover, it would seem that Pepco took appropriate steps to answer the alleged conduct of Wright's supervisor through a disciplinary action. *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764-65 (1998). Finally, Wright does not answer Pepco's contention that his various other allegations of discrimination, made at his deposition and elsewhere, are time-barred. *See* Pepco Mot. S. J. at 24-25.

As to Blakeney, Pepco argues without rebuttal that, at his deposition, Blakeney conceded the untruth of his allegations about favorable rotation of two white employees. Dep. of George A. Blakeney, Dec. 12, 2003, at 111-13. He has furthermore not explained how his temporary rotation to the Oil Department amounts to an adverse employment action redressable under the discrimination laws. *See Brown*, 199 F.3d at 456 ("A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."); *Mungin v. Katten Muchin & Zavis*, 116 F.3d 1549, 1556-57 (D.C. Cir. 1997); *Walker v. WMATA*, 102 F. Supp. 2d 24, 29 (D.D.C. 2000) (a letter of reprimand did not constitute adverse employment action where it "did not effect any material change in [plaintiffs] title, duty, salary, benefits, or working hours"); *Lester v. Natsios*, 290 F. Supp. 2d 11, 28 (D.D.C. 2003) ("Purely subjective injuries, such as dissatisfaction with reassignment, public humiliation or loss of reputation, or unhappiness over assigned duties are not adverse actions."). Moreover, because it is unsupported by any evidence of racial animus, Blakeney's claim that his supervisor conspired with an independent contractor to kick him is not actionable as either retaliation or harassment.

Briscoe's charges of discrimination in promotion fail primarily because he was ineligible for promotion at the relevant junctures in light of pending disciplinary proceedings against him. He does not refute that he was passed over for promotions in favor of African American as well as white employees. Pepco Mot. S. J. at 34. instead, he insists that two white-employees involved in accidents similar to the one in which he was involved received more lenient forms of discipline. Yet there is scant record evidence to support his contention, and he admits that factors other than his race contributed to his failure to win promotions. *Id.* His claims of discrimination in assignments and overtime fare no better: they are supported by no evidence of racial animus and rely exclusively on conclusory assertions in his complaints. The Union defendants furthermore note that Briscoe failed to make timely requests for arbitration regarding the alleged incidents of discrimination. Union Mot. S. J. at 7. Briscoe has failed to adduce any evidence that the Union, which has processed fourteen grievances for him over the last twenty years, is somehow biased against him.

Scott's allegation that he was denied a promotion in 1998 is plainly time barred. *See* 42 U.S.C. § 2000e-5(e)(1); D.C. CODE ANN. § 2-1403:16; *Brown*, 251 F. Supp. 2d at 162. Nor can his allegation that he is "currently being denied a promotion," 2d Am. Compl. ¶ 5, survive summary judgment. He concedes that he has not completed the time-in-grade requirement or necessary assignments for a promotion. His claim that his rotations have not exposed him to assignments needed for his advancement must fail because it does not allege the kind of adverse employment action redressable under the discrimination laws. *See Brown*, 199 F.3d at 456. Moreover, he has not demonstrated that his rotations were racially motivated, and does not claim that the incidents of verbal harassment he alleges were attributable to racial prejudice.

Wood's claims fail for similar reasons. Work assignments generally are not adverse employment actions. Moreover, he has not produced reliable evidence that his objectionable assignments were doled out on the basis of race, and in any event, does not allege that he was eligible for the promotion he sought. He has not established that the two white employees who allegedly were not transferred (as he was) to a service truck are similarly situated to him in terms of their qualifications. And, to the extent he makes a hostile work environment claim, it fails because it relies exclusively on the scattered alleged statements of co-workers largely to persons other than himself—in fact, he admits that he has experienced no name-calling or explicit derogation during his Pepco employment. *See* Dep. of Philip Wood, Dec. 15, 2003, at 333-34.

Stanford's claims cannot survive summary judgment either, because they lack support even in his sworn deposition testimony. Contrary to the assertion in the Second Amended Complaint, Stanford said in his deposition that he never requested a transfer to the contested position after discovering that it paid more. Dep. of Calvino Stanford, Dec. 17, 2003, ("Stanford Dep.") at 138. And assuming for the moment that he has stated a prima facie case of discrimination—he claims that a less-qualified white woman was hired to fill a position into which he wanted to transfer and for which he was qualified—he has not rebutted Pepco's contention that he had less relevant field experience than the woman ultimately chosen for the position. *See* Pepco Mot. S. J. at 51. He also has no reply to Pepco's assertion that he failed to meet a weight-lifting requirement for the position at the time he requested a transfer. Tellingly, when a medical exam by his own physician showed that he could meet the requirements, he was transferred with back pay. *Id.* at 52-53. There is, in short, inadequate record evidence to raise a triable issue as to whether Pepco discriminated against Stanford on the basis of race.

Finally, plaintiffs have failed to make a showing adequate to survive summary judgment on their claim that the Union defendants breached their duty of fair representation. "A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Vaca v. Sipes*, 386 U.S. 171, 190 (1967). Additionally, in order to prevail, a plaintiff must show that the employer's actions violated an applicable collective bargaining agreement. *DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 165 (1983). Where, as here, the collective bargaining agreement permits an employee to file a grievance on his or her own behalf, and he or she fails to do so, a duty of fair representation claim will be barred. *Angst v. Mack Trucks, Inc.*, 969 F.2d 1530, 1537-38 (3d Cir. 1992).

Only plaintiffs Briscoe and Stanford seem to oppose the Union defendants' motion for summary judgment. *See* Pls. Opp'n. to Union Mot. S. J. at 1. In doing so, they claim that the Union's actions in allegedly failing to pursue its members' grievances violate Title VII and other. discrimination laws. *Id.* at 1-2. As the Union notes, however, it has never been named in an EEOC complaint by any of the plaintiffs. Additionally, plaintiffs' submissions in opposition to the Union's motion for summary judgment take a hopelessly unsystematic approach to demonstrating the Union's alleged discrimination. For instance, plaintiffs compare the discipline received by Briscoe to that received by a single white employee allegedly involved in a similar incident and conclude, because the white employee received less punishment, that discrimination is afoot. Absent from plaintiffs' narrative, however, is any discussion of whether the circumstances of the two cases differed in any meaningful regard—to say nothing of less anecdotal forms of evidence based on sources other than the Second Amended Complaint or Briscoe's own affidavit. Similarly, Stanford's claims against the Union fail because discovery in this case has not yielded adequate

evidence to support the notion that the Union acted arbitrarily in fielding his inquiries about grievances; indeed, his deposition testimony indicates that he did not ask his steward to file a grievance on his behalf regarding his allegations. Stanford Dep. at 146. Plaintiffs simply do not establish that the Union acted arbitrarily or discriminatorily in its representation of Briscoe and Stanford, and summary judgment is therefore appropriate on plaintiffs' claims against the Union.

Furthermore, as to Coleman, plaintiffs have failed to explain why he as an officer of the Union is an appropriate party for this suit. *See* 29 U.S.C. § 185(b) (A union "may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets."). Plaintiffs claims against Coleman are based solely on his acts as an officer of the Union representing its membership. Where that is the case, he cannot be held personally liable for alleged violations of a collective bargaining agreement or to third parties for acts performed on the Union's behalf. *See Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 347-49 (1962); *Morris v. Teamsters Local 819*, 169 F.2d 782, 783 (2d Cir. 1999); *Peterson v. Kennedy*, 771 F.2d 1244, 1256-57 (9th Cir. 1985), *cert. denied*, 475 U.S. 1122 (1986).

D. Rule 11 Sanctions

On the whole, plaintiffs' submissions leave much to be desired in terms of clarity and evidentiary support. Plaintiffs' class certification motion is especially weak, unsupported as it is by any evidence that the purported class members have grievances similar to those of the named plaintiffs in any significant regard. Nonetheless, only the Union has moved for an award of Rule 11 sanctions in this case, and it has done so merely by cloning its memorandum in support of its summary

judgment motion. Absent a more thorough showing of bad faith on plaintiffs' behalf, the Court declines to award Rule 11 sanctions at this juncture.

CONCLUSION

For the reasons discussed in this Memorandum Opinion, plaintiffs' motion for class certification will be denied, defendants' motions for summary judgment will be granted, Pepco's motion for further discovery will be denied as moot, and the Union's motion for Rule 11 sanctions will be denied. A separate order shall be issued on this date.

/s/ John D. Bates
United States District Judge

Signed this 25th day of August, 2004.

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 03-0946 (JDB)

JESSIE BUTLER, *et al.*,
Plaintiffs,

v.

POTOMAC ELECTRIC POWER COMPANY, *et al.*,
Defendants.

ORDER

Upon consideration of plaintiffs' motion for class certification, defendants' motions for summary judgment, Pepco's motion for additional discovery, and the Union defendants' motion for summary judgment, it is this 25th day of August, 2004, hereby

ORDERED that plaintiffs' motion for class certification is DENIED; and it is further

ORDERED that Pepco's motion for summary judgment is GRANTED; and it is further

ORDERED that Pepco's motion for additional discovery is DENIED as moot; and it is further

ORDERED that the Union defendants' motion for summary judgment is GRANTED; and it is further

ORDERED that the motion of the Union defendants for Rule 11 sanctions is DENIED.

/s/ John D. Bates
United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Filed May 24, 2005]

No. 04-7153

DANIEL WRIGHT, *et al.*,
Appellants,

v.

POTOMAC ELECTRIC POWER COMPANY, *et al.*,
Appellees.

Appeal from the United States District Court
for the District of Columbia
(No. 03cv00946)

Before: SENTELLE, RANDOLPH, and GARLAND, *Circuit Judges.*

JUDGMENT

This appeal was considered on the record from the United States District Court for the District of Columbia and on the briefs of the parties. *See* Fed. R. App. P. 34(a)(2); D.C. Cir. R. 34(j). The court has determined that the issues presented occasion no need for a published opinion. *See* D.C. Cir. R. 36(b). It is

ORDERED and ADJUDGED that the judgment of the District Court be affirmed for the following reasons.

Plaintiffs George Blakeney, Calvino Stanford, Quinton Briscoe, and Daniel Wright appeal the district court's grant of summary judgment in their employment discrimination suit

against the Potomac Electric Power Company (PEPCO), Local Union 1900 of the International Brotherhood of Electrical Workers, and John Coleman, the Union's President. With respect to Blakeney's discrimination claim against PEPCO, we affirm for the reasons set forth below. With respect to all other claims and all other plaintiffs, we affirm for the reasons stated in the district court's memorandum opinion of August 25, 2004.

Blakeney contends that PEPCO discriminated against him by delaying implementation of a rotation system so that he, and not a white employee, would be the first to rotate temporarily into an undesirable position in the Oil Department. The district court granted PEPCO's motion for summary judgment on the ground that Blakeney had not explained how his temporary rotation amounted to adverse employment action. We need not decide that question, however, because Blakeney's claim fails for a more fundamental reason. Blakeney conceded at his deposition that PEPCO had a legitimate, nondiscriminatory reason for implementing the rotation system when it did. As a result of his concession, Blakeney cannot show that "a reasonable jury could conclude that" the challenged actions were undertaken "for a discriminatory reason," and therefore summary judgment was properly granted. *Morgan v. Federal Home Loan Mortgage Corp.*, 328 F.3d 647, 651 (D.C. Cir. 2003).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

FOR THE COURT
Mark J. Langer, Clerk
BY: /s/ MICHAEL C. MCGRAIL
Michael C. McGrail
Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Filed Jul. 26, 2005]

No. 04-7153
September Term, 2004
03cv00946

JESSIE BUTLER, *et al.*,
Appellees,

DANIEL WRIGHT, *et al.*,
Appellants,

v.

POTOMAC ELECTRIC POWER COMPANY, *et al.*,
Appellees.

BEFORE: SENTELLE, RANDOLPH, and GARLAND, *Circuit Judges*.

ORDER

Upon consideration of appellants' petition for rehearing filed June 23, 2005, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

By: /s/ Nancy G. Dunn
NANCY G. DUNN
Deputy Clerk

APPENDIX D

FEDERAL RULE OF CIVIL PROCEDURE, RULE 56(c)

MOTION AND PROCEEDING THEREON. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposition affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

JAN 9 - 2006
OFFICE OF THE CLERK

No. 05-741

IN THE

Supreme Court of the United States

DANIEL WRIGHT, *et al.*,

Petitioners,

v.

POTOMAC ELECTRIC POWER COMPANY, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION OF POTOMAC ELECTRIC POWER COMPANY

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QUESTION PRESENTED

Whether the Court of Appeals correctly applied to the particular facts of this employment discrimination case the proper standards and rules for granting motions for summary judgment.

RULE 29.6 STATEMENT

Respondent Potomac Electric Power Company ("Pepco") is not a publicly-held corporation. Its parent corporation is Pepco Holdings, Inc., a publicly-held corporation that owns 10 percent or more of Pepco's stock. No other corporation owns 10 percent or more of Pepco's stock.

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IN THE

Supreme Court of the United States

No. 05-741

DANIEL WRIGHT, *et al.*,

Petitioners,

v.

POTOMAC ELECTRIC POWER COMPANY, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION OF POTOMAC ELECTRIC POWER COMPANY

Respondent Potomac Electric Power Company ("Pepco") respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the decision of the United States Court of Appeals for the District of Columbia Circuit in this case.[1]

[1] Respondents Local Union No. 1900 of the International Brotherhood of Electrical Workers and its President, John A. Coleman, are represented by other counsel. By letter dated December 20, 2005, they informed this Court that they do not intend to respond to the petition unless a response is requested by this Court.

INTRODUCTION

Petitioners Daniel Wright, George A. Blakeney, Quinton Briscoe, and Calvino Stanford have asked this Court to review a decision adverse to them in an employment discrimination lawsuit they brought against Pepco. Their request is not warranted, however, in light of the District Court's and the D.C. Circuit's correct application of well-settled standards and rules for granting motions for summary judgment and in light of the clear lack of significant issues deserving of this Court's attention on certiorari.

Indeed, as the petition reads, Petitioners are merely contesting certain factual findings made by the District Court, rather than providing any "compelling reasons" for granting certiorari. S. Ct. R. 10. Notably, Petitioners fail to assert that the D.C. Circuit has decided an "important question of federal law" in a way that "conflicts with relevant decisions of this Court" or of the courts of appeals or that this case presents an opportunity to resolve a question this Court has declined to take up in the past. *Id.* Moreover, there is no basis for Petitioners' assertion that the District Court did not follow D.C. Circuit precedent. In short, the District Court made factual findings that were fully supported by the record before it, and it and the D.C. Circuit properly applied established precedents and rules to correctly grant summary judgment to Pepco.

COUNTERSTATEMENT

Because the petition primarily raises issues of fact in the context of granting a summary judgment motion, a brief summary of the factual background of the case and the briefing of the summary judgment motion is necessary.

1. Petitioners' Allegations. Petitioners are four of the eight plaintiffs who filed a putative class action lawsuit against Pepco in the District Court. Plaintiffs sought to represent a class of present and former Pepco employees who

allegedly were discriminated against on the basis of race. *See* Pet. App. 1a. Plaintiffs alleged a wide variety of claims, and Petitioner Blakeney's allegations, for example, included claims that his being kicked on the backside by an independent contractor and his temporary assignment to Pepco's oil department as part of a rotation program were discriminatory acts. *See id.* at 5a-6a. The District Court denied plaintiffs' motion for class certification, a ruling that plaintiffs did not appeal. *See id.* at 10a-11a, 22a-23a.

2. Briefing of Summary Judgment Motion. Pepco moved for summary judgment on each of the eight plaintiffs' claims and submitted a Statement of Undisputed Material Facts as required by the District Court's Local Civil Rule 7(h). Plaintiffs' Opposition contested Pepco's Motion for Summary Judgment only with respect to three plaintiffs, and not at all with respect to Petitioner Blakeney. Plaintiffs' Opposition also did not respond to Pepco's Statement of Undisputed Material Facts and did not include a "separate concise statement of genuine issues setting forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated" as required by the District Court's Local Civil Rule 7(h). *See* Pet. App. 3a. Plaintiffs' submissions in support of their Opposition consisted solely of one exhibit and unnotarized "Affidavits" of Petitioners Briscoe, Wright, and Stanford.

Pepco filed a Reply Brief in support of the Motion for Summary Judgment. Several months after the Summary Judgment Motion was ripe, Plaintiffs' counsel filed two additional "Oppositions" to Pepco's Motion. The additional "Oppositions" and the unnotarized "Affidavits" and interrogatory answers from Petitioners Wright and Blakeney attached to them were not authorized by the District Court's rules. Plaintiffs still did not submit a statement of genuine issues of fact for trial as required by Local Civil Rule 7(h).

3. Granting and Affirming Summary Judgment. The District Court granted Pepco's Summary Judgment Motion in its entirety. *See* Pet. App. 13a-17a. The District Court held that many of plaintiffs' claims were time-barred, that they failed to make out a prima facie case of discrimination, and that there was no evidence that any of the actions about which plaintiffs complained were motivated by discriminatory animus. *See id.*

Four of the plaintiffs – the Petitioners here – appealed the District Court's decision to the United States Court of Appeals for the District of Columbia Circuit contending that the District Court disregarded their affidavits and made erroneous factual findings. The D.C. Circuit affirmed the District Court's order without oral argument in a unanimous and unpublished *per curiam* decision. *See id.* at 22a-23a. The D.C. Circuit affirmed the District Court "for the reasons stated in [its] memorandum opinion," except with respect to a claim by Petitioner Blakeney, which it affirmed for one of the two alternative reasons relied on by the District Court. *See id.* Petitioners sought a rehearing, but were denied. *See id.* at 24a.

REASONS FOR DENYING THE WRIT

Petitioners again challenge the factual findings made by the District Court in granting summary judgment to Pepco on their discrimination claims. As demonstrated below, however, Petitioners fail to show how any of the alleged errors warrant this Court's review.

I. THERE IS NO COMPELLING REASON WHY THIS CASE WARRANTS THIS COURT'S REVIEW.

Nowhere in their petition do Petitioners assert that any of the "compelling reasons" for review by this Court enumerated in Supreme Court Rule 10 are present.

There is no assertion that the D.C. Circuit "entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." S. Ct. R. 10(a). This case simply does not implicate any important question of law.

Moreover, there is no assertion that the D.C. Circuit "decided an important question of federal law that has not been, but should be, settled by this Court * * * ." S. Ct. R. 10(c). This Court has previously considered and settled the issue of what standards govern motions for summary judgment, and in particular, in employment discrimination cases.[2]

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[2] *See, e.g.*, *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322-326 (1986) (addressing the showings required of movant and non-movant, and stating that summary judgment is mandatory against a party "who fails to make a showing sufficient to establish the existence of an element essential to [its] case"); *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 249-255 (1986) (addressing the showing required of non-movant and the analysis for determining what constitutes a genuine issue of material fact); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802-805 (1973) (establishing burden-shifting analysis applicable to employment discrimination claims); *Texas Dep't of Cmty. Affairs* v. *Burdine*, 450 U.S. 248, 252-256 (1981) (addressing plaintiff's burden of establishing prima facie case of discrimination and defendant's burden of putting forth legitimate and non-discriminatory reason for the challenged action); and *Reeves* v. *Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142-149 (2000) (addressing the analysis for determining whether plaintiff has met the ultimate burden of proving intentional discrimination). In addition to all these precedents, of course, Federal Rule of Civil Procedure 56 governs motions for summary judgment. The District Court cited and relied upon each of these cases and Rule 56 in determining that Pepco was entitled to summary judgment. *See* Pet. App. 9a-13a.

Finally, the D.C. Circuit did not decide "an important federal question in a way that conflicts with relevant decisions of this Court." S. Ct. R. 10(c). Without explaining why, Petitioners assert that the D.C. Circuit's decision "cannot be reconciled with either the principle or result in *Vasquez* v. *Hillery*, 474 U.S. 254 (1986) which stated the importance of stare decisis or *Patterson* v. *McLean Credit Union*, 491 U.S. 164[] (1989)[,] which requires lower courts to follow precedence [sic] until it has been overruled." Pet. 3. However, the decision below simply does not implicate the principles of *stare decisis* or adherence to precedent. The decisions of this Court cited by Petitioners are not relevant to and are indeed inapposite to the decisions below.

II. THE DISTRICT COURT CORRECTLY FOLLOWED AND APPLIED D.C. CIRCUIT PRECEDENT.

Petitioners argue that this Court should review the case because the District Court did not follow D.C. Circuit precedent. *See* Pet. 3-4. Specifically, Petitioners argue that the District Court's citation in a footnote to its Local Civil Rule 7(h) – which provides that, if a non-movant fails to respond to the movant's statement of undisputed facts, then the Court may assume that such facts are admitted by the non-movant – conflicts with *Burke* v. *Gould*, 286 F.3d 513 (D.C. Cir. 2002). *See id.*[3] They assert that *Burke* stands for

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[3] The District Court's Local Civil Rule 7(h) reads as follows: "Each motion for summary judgment shall be accompanied by a statement of material facts as to which the moving party contends there is no genuine issue, which shall include references to the parts of the record relied on to support the statement. An opposition to such a motion shall be accompanied by a separate concise statement of genuine issues setting forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated, which shall include references to the parts of the record relied on to support the statement. • • • In determining a motion for summary judgment, the Court may assume that facts identified

the innocuous propositions that (1) Local Civil Rules supplement and should be construed in harmony with the Federal Rules of Civil of Procedure, and (2) Federal Rule of Civil Procedure 56(c) requires the court to consider the pleadings, depositions, interrogatory answers, admissions, and affidavits in determining whether there are any genuine issues of material fact. *See id.*

Local Civil Rule 7(h) does not "conflict" with *Burke*. As an initial matter, the D.C. Circuit disagreed that the District Court did not follow its precedent and affirmed the District Court's decision. *See* Pet. App. 22a-23a. Moreover, the D.C. Circuit determined that the District Court's application of law was straightforward, ordered that no oral argument was necessary, disposed of the appeal in a *per curiam* decision totaling a mere few paragraphs, and ruled that its non-controversial decision did not merit publication. *See id.*[4] The D.C. Circuit's disposition of this case, as that court appropriately recognized, is of moment only to these particular litigants. It therefore presents no issues of broader significance justifying review by this Court.

Moreover, Petitioners cannot explain how the District Court's Local Civil Rule 7(h) allegedly conflicts in any way with Federal Rule of Civil Procedure 56(c).[5] Rule 56(c) states that summary judgment is appropriate if the evidence before the court shows that there are no genuine issues of

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by the moving party in its statement of material facts are admitted, unless such a fact is controverted in the statement of genuine issues filed in opposition to the motion."

[4] Under D.C. Circuit Rule 36, the determination to not publish the decision means that there is no "general public interest" in the decision and that the panel saw "no precedential value" in it. D.C. Cir. R. 36.

[5] Petitioners did not comply with the District Court's Local Civil Rule 7(h) (*see* Pet. App. 3a), and they never explain their failure to do so.

material facts and the movant is entitled to judgment as a matter of law, and Local Civil Rule 7(h) merely addresses the consequences of the non-movant's failure to respond to the movant's statement of undisputed material facts. *See* Fed. R. Civ. Proc. 56(c); D.D.C. Local Civ. R. 7(h). The two rules are entirely consistent with each other, and a plain reading of them indicates that there is no conflict between them. In fact, local rules similar to Local Civil Rule 7(h) are common among the federal district courts.[6]

In any event, the District Court correctly applied D.C. Circuit precedent to the facts of this case. Consistent with *Burke* and Federal Rule of Civil Procedure 56(c), the District Court considered the evidence in the record before it. Petitioners' submissions to the District Court consisted almost entirely of their own affidavits and interrogatory answers, which the District Court correctly found to be "sparse," "scattershot," and "discursive" in nature. *See* Pet. App. 3a. Moreover, on repeated occasions, the District Court noted that the Petitioners' "evidence" consisted solely of their unsupported and conclusory allegations, which often contradicted their own deposition testimony. *See id.* at 14a-17a. *See also id.* at 19a ("On the whole, plaintiffs' submissions leave much to be desired in terms of clarity and evidentiary support."). In short, the District Court fully considered the Petitioners' submissions, but properly determined that they were unsupported by the evidence and failed to raise any genuine issues of material fact.

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[6] *See, e.g.*, C.D. Cal. Local R. 56-3; S.D. Fla. Local R. 7.5(D); N.D. Ga. Local Civ. R. 56.1(B)(2)(a)(2); D. Kan. Local R. 56.1(a); N.D. Ill. Local R. 56.1(a); N.D. Ind. Local R. 56.1(b); N.D. Iowa Local R. 56.1(b); M.D. La. Local Civ. R. 56.2; D. Me. Local R. 56(f); D. Mass. Local R. 56.1; E.D. Mo. Local R. 7-4.01(E); D.N.M. Local Civ. R. 56.1(b); E.D.N.Y. Local Civ. R. 56.1(c); S.D.N.Y. Local Civ. R. 56.1(c); D. Or. Local R. 56.1(f); M.D. Penn. Local R. 56.1; W.D. Penn. Local R. 56.1(E); M.D. Tenn. Local R. 8(b)(7)(g); E.D. Tex. Local R. CV-56(c); E.D. Va. Local Civ. R. 56.1(B).

III. THE DISTRICT COURT'S FACTUAL FINDINGS CHALLENGED BY PETITIONERS WERE FULLY SUPPORTED BY THE EVIDENCE.

The core of Petitioners' argument is that certain factual findings by the District Court were incorrect. *See* Pet. 2-3, 5. Not only is this claim without merit, it is also without effect. As this Court held long ago, "[w]e do not grant a certiorari to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S. 220, 227 (1925). *See also* S. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

In any event and contrary to Petitioners' assertions, the two factual findings challenged by Petitioners were fully supported by and did not misstate the record.

First, Petitioners challenge the District Court's finding that the man who kicked Petitioner Blakeney was an independent contractor – as opposed to an employee – of Pepco. *See* Pet. 5. The District Court characterized the man as an independent contractor because the Second Amended Complaint described him as a "contract worker" and there was no evidence in the record (submitted by Plaintiffs or otherwise) to the contrary. *See* Pet. App. 6a.[7] In any event, this factual finding was not material to the District Court's judgment. The District Court determined that the alleged kick was not actionable "because it is unsupported by any evidence of racial animus." *Id.* at 15a. Status as an independent contractor or employee played no part in the District Court's decision. *See id.*

Second, Petitioners challenge the District Court's finding that Petitioner Blakeney conceded during his deposition the

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[7] The District Court's determination was further supported by evidence in Pepco's Statement of Undisputed Material Facts, to which Petitioners did not respond.

untruth of certain allegations that two white employees were treated more favorably than him as part of a rotation program. *See* Pet. 5. The District Court made this determination in reliance upon evidence and deposition testimony of Petitioner Blakeney submitted by Pepco. *See* Pet. App. 15a. Petitioners did not rebut that evidence or submit any contrary evidence. *See id.* In light of the undisputed factual record before it, the District Court's factual finding was not erroneous.

In sum, even if incorrect factual findings merited this Court's review – which they do not – the two factual findings at issue here were fully supported by the evidence before the District Court.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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